

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 27839-5-III
)	
Respondent,)	
)	
v.)	Division Three
)	
ROGER PAUL DROTT,)	
)	
Appellant.)	UNPUBLISHED OPINION

Korsmo, A.C.J. — Roger Drott challenges his Benton County convictions for one count of leading organized crime and two counts of possession of stolen property on the basis the trial court erred in admitting recordings of his telephone conversations. We find harmless error in the admission of a private telephone conversation and conclude his challenges to the recording of his jail telephone conversations were waived. The convictions are affirmed.

As part of a plea agreement, Brian Buell agreed to provide information on Mr. Drott’s fraudulent credit card/gift card scheme. Amanda Long had a counterfeit

identification card and gift card she claimed to have gotten from Mr. Drott. A controlled “buy” was coordinated. Mr. Buell and Ms. Long were searched; their vehicle was searched and they were under police surveillance during the entire “buy.” They went to Mr. Drott’s residence and obtained a fraudulent gift card with a stolen credit card number.

On the way to meet with detectives, the pair received a telephone call from Mr. Drott. The call was placed on speaker phone so the detective and Ms. Long could listen. The detective and Mr. Buell both recorded the conversation. At Mr. Drott’s request, Jennifer Torres made the call and requested cigarettes as payment for the card. Mr. Drott also requested a one-half rack of Coors beer and provided information on how to use the gift card, stating they could “use the card over and over,” and that he “only had a few of those numbers left.” Verbatim Report of Proceedings (VRP) 66-67, 120. The recording was played at trial.

A search warrant was obtained for Mr. Drott’s residences. The search produced: (1) a Crown Royal bag containing over 400 credit card receipts with credit card numbers, names and expiration dates; (2) a stack of debit gift credit cards; (3) laminate material of various sizes and shavings; (4) a notebook with a list of credit card numbers; (5) a stack of gift cards with their numbers sanded off and modified with credit card numbers added; these numbers corresponded to the numbers contained in the notebook. A credit card

receipt which matched the fraudulent card given to Ms. Long was also found.

Mr. Buell testified that Mr. Drott told him about his scheme. He made the false cards by first shoplifting gift cards (preferably VISA) without raised numbers. He then scraped the numbers off, covered them with new numbers, and laminated them. Buell observed Drott making the cards and further testified that Mr. Drott expected 50 percent or so of any profits obtained with a false card. Ms. Long testified similarly that Mr. Drott had shown her how he made the gift cards, instructed her where to use the cards and that he expected payment from items purchased with the card.

Mr. Drott testified at trial. He identified the fraudulent card as one Mr. Buell had given to him during the controlled “buy.” He had given Mr. Buell a valid \$100 gift card during the controlled “buy” and requested beer in exchange for the card. He admitted making his telephone statements, including that he asked for beer in exchange for the gift card and that he only had a few remaining credit card numbers. He denied receiving any property or goods from other individuals who testified against him. He also denied the Crown Royal bag was his and suggested it belonged to his brother or another individual.

The trial court denied Mr. Drott’s motion to suppress his four-way conversation between Mr. Buell, Ms. Long and Ms. Torres and admitted the recording on the basis that all parties were going to testify at trial.

During trial, the parties also discussed Mr. Drott’s telephone calls from jail. Mr.

Drott agreed to play snippets of his initiated telephone conversations instead of the entire telephone calls. He also requested additional sections be played to place the calls in context.

Mr. Drott was found guilty by jury of one count of leading organized crime and two counts of second degree possession of stolen property. By special verdict, the jury found Mr. Drott committed the crime of leading organized crime involved multiple victims and a high degree of sophistication. He was sentenced to an exceptional sentence of 216 months.

ANALYSIS

This appeal presents challenges to the two recordings used at trial. The issues are addressed separately.

First, Mr. Drott contends the telephone conversation to Mr. Buell and Ms. Long was private as it was made to Mr. Buell's private number and he did not consent to the recording. The privacy act, chapter 9.73 RCW, prohibits intercepting or recording a private communication transmitted by telephone unless all parties to the communication consent. RCW 9.73.030(1)(a). "Any information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state." RCW 9.73.050. "Whether a conversation is private is a question of fact but may be decided as a question of law where the . . . facts are not

meaningfully in dispute.” *State v. Modica*, 164 Wn.2d 83, 87, 186 P.3d 1062 (2008).

The privacy act does not define “private,” but courts have previously found it means ““belonging to one’s self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or public.”” *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384 (1996) (alterations in original) (quoting *Kadoranian v. Bellingham Police Dep’t*, 119 Wn.2d 178, 189-90, 829 P.2d 1061 (1992)). A communication is private under the act when (1) the parties have a subjective expectation that it is private, and (2) that expectation is objectively reasonable. *Modica*, 164 Wn.2d at 88. Among other things, the subject matter of the calls, the location of the participants, the potential presence of third parties, and the role of the interloper are relevant to whether the call is private. *Clark*, 129 Wn.2d at 225-227.

Under these well-settled standards, the telephone conversation between Mr. Drott, Mr. Buell, Ms. Long and Ms. Torres was a private communication. The call was initiated by Mr. Drott shortly after Mr. Buell left him and Mr. Buell was still in the car with Ms. Long. There was a reasonable expectation of not being overheard by third parties. The recording¹ should have been suppressed. *State v. Fjermestad*, 114 Wn.2d 828, 834-837,

¹ The defense only moved to suppress admission of the recording, not the testimony of the participating individuals. There was no objection to the testimony from Detective Davis, Mr. Buell or Ms. Long at trial.

791 P.2d 897 (1990).

The remaining question is whether admission of the recording was harmless error. Admission of evidence in violation of the privacy act is a statutory, not constitutional, violation. *State v. Courtney*, 137 Wn. App. 376, 383, 153 P.3d 238 (2007), *review denied*, 163 Wn.2d 1010 (2008). Nonconstitutional error is not prejudicial unless the evidence materially affected the outcome of the trial. *Id.* In this case, there is no reasonable probability that the outcome of the trial would have been different if the taped conversations were excluded. Ms. Long and Mr. Buell both testified without objection that they received fraudulent gift cards from Mr. Drott on previous occasions as well as on October 6, 2008. They testified Mr. Drott had shown them how to make fraudulent cards. Mr. Drott himself corroborated much of their testimony, including the contents of the challenged telephone conversation. There also was testimony from others that Mr. Drott requested some of the proceeds obtained with the fraudulent card as payment. In light of this evidence, the admission of the taped conversation did not materially affect the verdict. Any error in the admission is harmless.

Mr. Drott also contends that the court erred in admitting his telephone conversations from jail. For the first time on appeal, he contends that the recordings of phone calls from jail were inadmissible under the privacy act and made without his consent. Because he did not present this argument to the trial court, he cannot do so here.

RAP 2.5(a).

Failure to object to the testimony on the basis the taping was done without consent constitutes waiver on appeal. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); *State v. Sengxay*, 80 Wn. App. 11, 15, 906 P.2d 368 (1995). In addition, defense counsel here not only failed to object to the admission of the taped conversations, he requested additional portions of the conversations be played for the jury. For this reason, too, his belated challenge is waived. *Sengxay*, 80 Wn. App. at 15. This claim is not preserved for our review.²

CONCLUSION

It was harmless error to admit the four-way private telephone conversation as other untainted evidence was overwhelming. Mr. Drott failed to object to the admission of his jail telephone conversations. We affirm the convictions.

A majority of the panel has determined this opinion will not be printed in the Washington

² *Pro se*, Mr. Drott argues that there was insufficient evidence linking him to the crime and that his counsel was ineffective in that he failed to examine the witnesses about the “true length of deals and records.” There was more than sufficient evidence linking the crimes to Mr. Drott and the record establishes that all witnesses who testified against Mr. Drott were examined about their criminal histories and the details of any negotiations in exchange for their testimony. His arguments are without merit.

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Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, A.C.J.

WE CONCUR:

Sweeney, J.

Brown, J.